In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-572

SCHOENLING BREWING CO., INC.,
an Ohio Corporation,
Petitioner,

vs.

WURZBURGER HOFBRAU
AKTIENGESELLSCHAFT, a German joint stock company; ORIGINAL BEER IMPORTING & DISTILLING CO., INC., a New York corporation,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INTRODUCTION

We note respondents in their brief attempt to puff and bolster by colorful language what are called findings of fact and conclusions of law, but are in reality erroneous "legal conclusions" inconsistent with the controlling fact and law to which petitioner by its petition herein has largely called attention. Respondents have not addressed themselves to the controlling facts and law, either seriously or with care; in fact, in a number of instances they only respond with the lame "absurd".

Respondents' brief raises several issues as to which petitioner offers the following comments[1]:

Respondents' showing of distinctiveness was "satisfactory to the Pattent Office" only in the state of ignorance as to material facts which the Patent Office was kept by respondents' deceitful conduct.

At RB3 respondents state:

> "COUNTERSTATEMENT OF THE CASE
>
> "The German plaintiff is the owner of Federal trademark registrations for WURZBURGER and WURZBURGER HOFBRAU. Both registrations were issued under Section 2(f) of the Lanham Act (15 U.S.C. Section 1052(f)) upon *a showing satisfactory to the Patent Office* that the names had become distinctive . . ." (Emphasis supplied).

That showing was a carefully edited collection of selected items intended to deceive the Examiner and take advantage of his trust and confidence that the applicant and its attorneys conducted themselves in accordance with the requirements of Section 38 of the Lanham Act [15 U.S.C. § 1120], and discharged their uncompromising duties to report all facts concerning possible fraud and to deal with him in the highest degree of candor and good faith as spelled out in *Precision* and *Dorsey* quoted at pages 17 and 18 of the Petition for Writ of Certiorari.

The respondents withheld material facts known to them, examples of which included descriptive uses of Wurzburger by others in the United States, in Germany, in description of goods in U.S. Trademark Registrations and also

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[1] Citations herein to pages of the Petition for Writ of Certiorari are in the form P——, while those to Respondents' Brief are in the form RB——.

withheld the rejection of the respondents' like contention by the Treasury Department's 1962 ruling under the Federal Alcohol Administration Act, APPENDIX B at page 47 *et seq.* of the Petition for Writ of Certiorari herein. In short, the Examiner's trust was paid-off in the coin of guileful deceit. While the Examiner's actions clearly showed he considered certain types of facts material, respondents argued disparagingly on the facts he relied upon while concealing from him facts known to them of like or more damaging character. The Patent Office was not satisfied, it was victimized and through it the public generally and petitioner particularly are also victimized.

The Bavarian Case does not in fact or law support either respondents' claim or the District Court's finding of "secondary meaning" in Wurzburger here or the Circuit Court's affirmance.

Respondents mention *Anheuser-Busch* v. *Bavarian Brewing Co.*, 264 F.2d 88 (6 Cir. 1959), in the footnote on page 5 of their brief. They have omitted reference to the reported opinion in *International Breweries, Inc.* v. *Anheuser-Busch, Inc.*, 364 F.2d 261 (1966), rendered in subsequent litigation regarding BAVARIAN in Florida and neighboring states between the interests of the parties in the case they cite. The courts in the subsequent case rejected argument premised upon essentially the same rationale as those of respondents here. Nor have respondents mentioned that evidence of their use of Bavarian on their beer made in Bavaria and sold in the "Cincinnati market" was treated as of no material consequence in the case they cite where "secondary meaning" was found in Bavarian in the "Cincinnati Market", nor do they mention that their claim and the District Court's erroneous finding that Wurzburger

acquired a "secondary meaning" in the "Cincinnati market" is on a record here of negligible sales of about 4 barrels per week of bottled and draft beer combined.

Respondents put the cart before the horse when they argue that the District Court's finding of "secondary meaning" distinguishes Saxlehner for under Saxlehner that finding is error as a matter of law because WURZBURGER is incapable of becoming a trademark on the facts herein.

"Nothing in *Saxlehner* v. *Wagner,* 216 U.S. 375 (1910) supports defendant's position. The court of appeals pointed out the basic distinction — in the present case 'Wurzburger' had acquired a secondary meaning as found by the district court and the patent office (46)." [Respondents' Brief, page 7]

Trademark law is part of the law of unfair competition. This Court pointed out in *Sears, Roebuck & Co.* v. *Stiffel Co.,* 376 U.S. 225, hereinafter *Sears,* at 232:

"Sears has been held liable here for unfair competition because of a finding of likelihood of confusion based only on the fact that Sears' lamp was copied from Stiffel's unpatented lamp and that consequently the two looked exactly alike. *Of course there could be 'confusion' as to who had manufactured these nearly identical articles. But mere inability of the public to tell two identical articles apart is not enough to support an injunction against copying or an award of damages for copying that which the federal patent laws permit to be copied.* Doubtless a State may, in appropriate circumstances, require that goods, whether patented or unpatented, be labeled or that other precautionary steps be taken to prevent customers from being misled as to the source, just as it may protect businesses in the use of their trademarks, labels, or

> distinctive dress in the packaging of goods so as to prevent others, by imitating such markings, from misleading purchasers as to the source of the goods."[2] (Emphasis supplied)

In the companion case, *Compco Corp.* v. *Day-Brite Lighting*, 376 U.S. 234, hereinafter *Compco*, where the trial court had found "secondary meaning", that finding was rejected with the comment at 238:

> "It is true that the trial court found that the configuration of Day-Brite's fixture identified Day-Brite to the trade because *the arrangement of the ribbing had, like a trademark, acquired a 'secondary meaning'* by which that particular design was associated with Day-Brite. *But if the design is not entitled to a design patent or other statutory protection, then it can be copied at will.* (Emphasis supplied)

WURZBURGER on the facts here, under the law of *Saxlehner* is incapable of exclusive appropriation as a trademark and therefor even if respondents alone used it in the U.S. Market and it acquired a "secondary meaning" like a trademark, it, like the arrangement of ribbing in *Compco*, can be copied at will as a matter of strong public policy, and the geographical expression may be used to signify the source of the model of which it is considered to be a copy.

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[2] As to alcoholic beverages, Congress has by Section 5(e) of the Federal Alcohol Administration Act [P4-5] provided for protection of consumers through regulation now exercised by the Secretary of the Treasury.

Respondents contend Schoenling caused rampant confusion by using "OLD WURZBURGER TYPE" in connection with its beer and erroneously represent same evidences trademark infringement.

The evidence of instances of alleged "confusion" was adduced by respondents from several witnesses. Tenbrink testified to "confusion" which was nothing more than the occasion when he learned that more than one brewery made Wurzburger type beer [R.A204-A205].[3] Lenhardt testified he knew several breweries made WURZBURGER, but not realizing Wurzburger type products of two breweries were both available there (each describable by the geographical term WURZBURGER), he on occasion ordered by the geographical term and got petitioner's article when he expected he would get respondents' article [R.A97-A102]. Hageman, a waiter, testified he received complaints about the price of respondents' beer he served customers who ". . . thought they might be drinking Schoenling Wurzburger... they had drunk Schoenling Wurzburger at other restaurants in the city . . ." [R.A154-A155]. He also testified he had been asked ". . . maybe a thousand times", if the Wurzburger he served was brewed by Schoenling. Fisher, route manager of respondents' distributor, testified that the trade refused to buy respondents' imported Wurzburger beer because they could buy Schoenling's Wurzburger beer for a much lower price [R.355-356 (A.200)].

Any "confusion" that evidence showed was of the sort as to which it was commented in *Sears, supra,* at 232:

> "Of course these could be 'confusion' as to who had manufactured these nearly identical articles. But mere inability of the public to tell two identical articles

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[3] Citations in the form R.A—— refer to pages of the printed Appendix (white cover) included in the Record transmitted by the Clerk of the U.S. Court of Appeals for the Sixth Circuit.

> apart is not enough to support an injunction against copying or an award of damages for copying that which the federal patent laws permit to be copied."

It is also worthy of note that, although the one witness on the one occasion when his ignorance was dispelled may have been "confused", respondents' evidence shows there was no palming off of petitioner Schoenling's article as respondents' article for the trade and the consumers knew petitioner Schoenling was a source for Wurzburger Type beer, bought that beer as Schoenling's, and any "confusion" was, in the words of *Saxlehner*, only due to the good will of the goods. Just as there is no "secondary meaning", there was no infringement, palming off of the goods of petitioner as those of respondent, the lower courts' conclusions to the contrary notwithstanding.

Respondents' argument that Saxlehner is distinguished here because Schoenling did not openly identify its Wurzburger type beer "as artificial and an imitation" is a sham and without merit.

Respondents at page 7 of their brief seek to distinguish *Saxlehner* by arguing that Schoenling did not identify its product as artificial and an imitation, but Schoenling did identify its product as of domestic origin.

While petitioner's counsel know the term "near beer" has been used on malt beverages of low alcoholic content, they have no knowledge of the use of the term "artificial beer", and, believe it would be unlawful to sell beer falsely marked "artificial beer" when it is beer in fact. Respondents have in their brief ignored both the fact and the District Court's finding, that:

> ". . . the general labeling and advertising of the defendant was of *'Old Wurzburger type beer'* . . ." (Emphasis supplied) [P28]

The malt beverage labeling regulation, 27 C.F.R. § 7.24 (e) [P7] requires use of the,

> ". . . word 'type' or the word 'America', or some other statement indicating the true place of production . . ."

in conjunction with the geographical term Wurzburger, where the Wurzburger type beer is made in a place other than Wurzburg, Bavaria. Under *Saxlehner* and the labeling regulation, Schoenling had the right to use the word Wurzburger in telling the public what it thought its product was, so long as it used (as it did) the word 'type' in conjunction with Wurzburger to indicate its product was not made in Wurzburg, Bavaria.

CONCLUSION

Respondents set out to monopolize the article Wurzburger type beer in commerce which may be regulated by Congress by procuring the statutory monopoly of registrations of WURZBURGER HOFBRAU and WURZBURGER (and the abbreviation WURZ) as trademarks through practice of fraud upon the Patent Office and then used the fraudulent registrations in threatening petitioner and other competitors, finally bringing this suit on the registrations as part of its attempt to gain an absolute monopoly in the article, Wurzburger type beer. As is characteristic of would be monopolists, they undoubtedly sued petitioner because they believed petitioner's business in the article was a commercial failure [RB8] which, if true, would enhance the effect of economic leverage of litigation expenses in favor of a quick cheap victory like those in patent cases noted by this Court in *Blonder-Tongue, Inc. v. University of Illinois Foundation*, 402 U.S. 313 at 334-348. Grant of the Writ of Certiorari sought is solicited

in order that the opinions and judgments of the courts below in conflict with the decisions of this Court may upon review be reversed and the strong public policy in favor of free competition in unpatented articles (Wurzburger type beer) restored through appropriate instruction of the lower courts and that petitioner may have full relief to which it is justly entitled under law.

Respectfully submitted,

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